allegations that both vehicles were travelling in opposite directions with the consequent collision of the first respondent's motorcar into the rear tyre of the motor lorry would surely, in my opinion, show a defence on the merits or at least there is an arguable case or an issue which should go for trial.

For the reasons stated above, I allow the appellants' appeal. An enlargement of time would be granted to the appellants. The appellants will file their defence within three weeks from the date of this judgment. The appellants will pay the costs of this appeal.

PADU EHSAN SDN. BHD.

v.

BINAAN JOHANESA SDN. BHD. AND PERBADANAN KEMAJUAN NEGERI MELAKA (GARNISHEE)

HIGH COURT, MELAKA
TUAN HAIDAR BIN MOHD NOOR J.
[CIVIL SUITS NO. 22-113-1992
& 22-114-1992]
2 AUGUST 1993

PRACTICE AND PROCEDURE: Enforcement of judgments - Setting aside of orders nisi - Whether garnishee body entitled to protection of the Government Proceedings Act 1956 - Failure to state sum owed in application for order nisi - Whether fatal - Whether there was compliance with O. 49 r. 2 RHC 1980.

On 30 May 1993, the Court gave judgment for damages to be paid to the plaintiff in two suits for breach of contract which were consolidated. The defendant/judgment debtor (JD) appealed against the said judgment but in the meantime, the plaintiff, judgment creditor (JC) applied for garnishee proceedings. JD now seeks to set aside the orders nisi obtained and further to stay proceedings on the execution of the judgment until the disposal of the appeal.

JD in applying to set aside the orders nisi contends that:

(a) Two of the garnishees involved, namely Majlis Perbandaran Melaka Bandaraya Bersejarah and Perbadanan Kemajuan Negeri Melaka are considered government bodies and are not subject to garnishee proceedings.
(b) In respect of the garnishees who are financial institutions, there was no sum stated in the application for the orders nisi.
(c) In respect of the rest of the garnishees, O. 49 r. 2 RHC was not complied with.
(d) The judgment order was wrongly dated.

Held:

[1] The definition of 'Government' in s. 2 of the Government Proceedings Act 1956 refers to the Federal Government and the Government of the States. 'Government' here does not include bodies established under either Federal or State laws such as the statutory bodies aforestated as garnishees in the action.

[2] No sum was stated in the application pertaining to the garnishees who are financial institutions in view of the bank customer relationship. JC could only state the account available and not disclose the amount outstanding. In any event, the fact that the amount of a debt due or accruing being unascertained does not prevent a garnishee order nisi from being made.

[3] The allegation of non-compliance with O. 49 r. 2 RHC is that JC acted *mala fide* in filing the garnishment notice to show cause as according to JD there was a dispute as to the terms of the judgment which was to be sorted out before the SAR. Solicitors of JD did not return the copy of the draft judgment sent to them for approval in accordance with O. 42 r. 8(1) RHC but wrote directly to the SAR seeking for an appointment under O. 42 r. 8(3). Under O. 42 r. (2), when JD omitted to return the draft within the time prescribed, he is deemed to have consented to the terms therein. Furthermore, there is no uncertainty in the terms of the judgment and it appears that the allegation of uncertainty was merely to delay the execution process.

Furthermore, there is no necessity for a letter of demand prior to commencement of execution proceedings as the judgment takes effect from the day of its date and the garnishee proceedings taken between the time of the pronouncement of the judgment and the date it was entered are valid.

[4] A wrongly dated judgment is not a fatal error but merely a clerical error, an irregularity covered under O. 2 RHC.

[5] The submission that there are special circumstances to support the application for an order of stay on the contention there are strong grounds on the appeal is not supported at all in the affidavit. The case is appropriate for a conditional order of stay.

[Application to set aside orders nisi dismissed with costs. Conditional order for stay on deposit of RM900,000 or bank guarantee of equivalent amount on or before 2 months from date of order. Costs in the cause].

Legislation referred to:
Government Proceedings Act 1956, s. 2
Rules of the High Court 1980, O. 42 rr. 7(1), 8(1), (2), (3), O. 49, r. 2

Other sources referred to:
Mallal's Supreme Court Practice, 2nd Edn., p. 491
Supreme Court Practice 1985, Vol. 1, p. 701, paragraph 49/1/12

For the judgment debtor - Yap Seet Pin (Lim Sung Yong with her); M/s. Chooi Shee Hoong & Gan
For the judgment creditor - Yau; M/s. Yau Jiok Hua & Co.

JUDGMENT

Haidar bin Mohd Noor J:
By consent, civil suits 22-113-1992 and 22-114-1992 were consolidated on the ground that the defendant is the same and though the plaintiffs are different but the directors/shareholders of both plaintiff's are more or less the same people and the claim for breach of contract in both suits would appear to be on similar grounds.

On 30 May 1993 I gave the following judgment in respect of both suits in favour of the plaintiff -

Civil Suit 22-113-1992.

1. Defendant to pay general damages of RM371,929.50;
2. Interest at the rate of 8% per annum from date of action, that is, 10 December 1992, to date of payment of the judgment sum; and
3. Costs.

Civil Suit 22-114-1992.

1. Defendant to pay general damages of RM493,227.80;
2. Interest at the rate of 8% per annum from date of action that is, 10 December 1992, to date of payment of the judgment sum; and
3. Costs.

The defendant appealed against my judgment as stated above.

After the judgment, the plaintiff/judgment creditor ("JC") proceeded with garnishee proceedings under O. 49 of the Rules of the High Court 1980 ('RHC').

JC filed the following *ex-parte* summons in chambers pursuant to O. 49 r. 2 of RHC.

In respect of civil suit 22-113-1992 three *ex-parte* summons in chambers were filed by JC (see encls. 93, 95 and 97). Similarly in respect of all the *ex-parte* summons in chambers, an affidavit in support was filed by one Tai Choon

@ Tai See, a director of JC (see encls. 94, 96 and 98).

In respect of encl. 93, the garnishee is Majlis Perbandaran Melaka Bandaraya Bersejarah and the sum allegedly due to the defendant/judgment debtor ('JD') from the garnishee is RM300,000.

In respect of encl. 95, the garnishee is Melaka Baru Sdn. Bhd. and the sum allegedly due to JD from the garnishee is RM300,000.

In respect of encl. 97, the garnishee is Bank of Commerce (M) Bhd, Melaka branch at No. 188-190, Taman Melaka Raya, Melaka for which JD allegedly has a current account No. 0401-0550-739-007 with the garnishee but the amount was not disclosed in the affidavit of Tai Choon @ Tai See.

With regard to civil suit 22-114-1992, six *ex-parte* summons in chambers were filed by the plaintiff/judgment creditor ('JC') under O. 49 r. 2 of RHC (see encls. 77, 79, 81, 83, 85 and 87). An affidavit in support of the six *ex-parte* summons in chambers was filed by one Goh Teck Seng, a director of JC (see encls. 78, 80, 82, 84, 86 and 88).

With regard to encl. 77, the garnishee is Majlis Perbandaran Melaka Bandaraya Bersejarah and the sum allegedly due to the defendant/judgment debtor ('JD') is RM300,000.

With regard to encl. 79, the garnishee is Perbadanan Kemajuan Negeri Melaka and the sum allegedly due is RM120,000.

With regard to encl. 81, the garnishee is Bank of Commerce (M) Bhd. Melaka Branch of No. 188-190, Taman Melaka Raya, Melaka. JD allegedly has a current account No. 0401-0550-739-007 with the garnishee but the amount was not disclosed in the affidavit of Goh Teck Seng.

With regard to encl. 83, the garnishee is Bank Bumiputra Malaysia Berhad, Melaka Branch of AG 8871, 8872 & 8873, Wisma Hj. Sulong Siban, Jalan Besar, Masjid Tanah, Melaka. JD allegedly has a current account or other account with the garnishee but the amount was not disclosed in the affidavit of Goh Teck Seng.

With regard to encl. 85, the garnishee is Hyundai Engineering & Construction Co. Ltd. of 13th. Floor, Plaza MBf, Jalan Ampang, Kuala Lumpur. The sum allegedly due to JD from the garnishee is RM80,000.

With regard to encl. 87, the garnishee is Melaka Baru Sdn. Bhd. of lot 3.26, Soon Seng Plaza, Jalan Hang Tuah/Jalan Kilang, Melaka. The sum allegedly due to JD is about RM300,000.

On 7 June 1993, JC obtained orders *nisi* from the Senior Assistant Registrar in respect of encls. 93, 95 and 97 for Civil Suit 22-113-1993 (see encls. 105, 106 and 107).

On 7 June 1993, itself JC obtained orders *nisi* from the Senior Assistant Registrar in respect of encls. 77, 78, 81, 83, 85 and 87 for Civil Suit 22-114-1992 (see encls. 103, 104, 105, 106 and 107).

The orders *nisi* obtained in both civil suits were accordingly served on all the garnishees and the garnishees were ordered to appear before the Senior Assistant Registrar on 13 July 1993, to show cause why orders *nisi* should not be made absolute. All the orders *nisi* were served on JD also.

JD in respect of Civil Suit 22-113-1992 filed, on 16 June 1993 (though dated 17 June 1993), a summons in chambers (encls. 123, 128 and 133) for an order to set aside the orders *nisi* obtained by JC.

JD also in respect of Civil Suit No. 22-114-1992, filed on 16 June 1993 (though dated 17 June 1993), a summons in chambers (encls. 123, 125, 130, 132, 134 and 139) for an order to set aside the orders *nisi* obtained by JC.

In addition thereto, the defendant filed summons in chambers on 9 June 1993 (though dated 17 June 1993) for an order to stay proceedings/action to execute the judgment until the disposal of the appeal of the defendant (encl. 120 in Civil Suit No. 22-113-1992).

From the affidavits filed by Kuan Ee Leong, a director of JD in support of the summons in chambers to set aside the orders *nisi* obtained by JC, JD is relying basically on three grounds:

(1) In respect of the garnishees, namely, Majlis Perbandaran Melaka Bandaraya Bersejarah and Perbadanan Kemajuan Negeri Melaka JD claimed that garnishee proceedings could not be taken against these garnishees as they are statutory bodies and are considered as government bodies.

(2) In respect of the garnishees who are financial institutions, no sum was stated in the application for a garnishee order *nisi*.

(3) In respect of all other garnishees, O. 49 r. 2 of RHC has not been complied with by JC.

Besides the above grounds, the Counsel for JD also submitted that the judgment order was wrongly dated, that is, it should be dated 30 May 1993 and not 31 May 1993. This error is not disputed but is such an error fatal? I do not think so. There is only one judgment obtained in respect of the litigation between the parties here and there are no other cases between themselves. Clearly, therefore it was a mere typing or clerical error and as such it is only an irregularity which is covered under O. 2 of RHC. In any event no injustice is caused to JD and neither was JD in any way misled as to the judgment sum that JD had to pay.

In respect of the protection of the Government Proceedings Act 1956 as contended by JD that Majlis Perbandaran Melaka Bandaraya Bersejarah and Perbadanan Kemajuan Negeri Melaka are 'government' under the said Act I am of the view that there was no substance or merits at all in such a contention as the definition of 'Government' in s. 2 of the said Act refers to Federal Government and the Government of the States. The word 'Government' does not include bodies that are established under either federal laws or state laws.

In respect of the allegation that no sum was stated therein in respect of financial institutions as garnishees, it would seem clear that in view of the bank customer relationship no disclosure could be made of the amount standing in the account of JD. Therefore JC could not possibly state the amount as such but could only state the account available. In any event the fact that the amount of debt due or accruing due is not ascertained does not prevent a garnishee order *nisi* being made. (see p. 701, paragraph 49/1/12 of **Supreme Court Practice 1985,** Vol. 1). Again there was no merit in the allegation of JD.

As regards to the allegation of non-compliance with O. 49 r. 2 of RHC by JC, it would be appropriate to set out O. 49 r. 2, which reads:

> 2. An application for an order under rule 1 must be made *ex-parte* by summons supported by an affidavit in Form 99 -
>
> (a) identifying the judgment or order to be enforced and stating the amount remaining unpaid under it at the time of the application; and
>
> (b) stating that to the best of the information or belief of the deponent the garnishee (naming him) is within jurisdiction and is indebted to the judgment debtor and stating the sources of the deponent's information or the grounds for his belief.

The main ground relied on by JD is that JC acted *mala fide* in filing the garnishment notice to show cause. It was alleged by JD that there was a dispute as to the terms of the judgment. JD applied for the matter of the terms of the judgment to be sorted out before the Senior Assistant Registrar under O. 42 r. 8 (3) of RHC. It was further alleged that there was no letter of demand from JC claiming for the payment of the judgment sum and costs from JD.

The draft judgment was faxed to the solicitors for JD on 1 June 1993, for approval and the solicitors were given two days to return the same duly approved with amendment, if any, failing which the solicitors for JC would proceed to forward same to the Senior Assistant Registrar for approval. (See exhibit 'K1 (a)'). This would appear to be in line with O. 42 r. 8(1) of RHC. Instead of responding to K1(a) JD's solicitors wrote direct to the Senior Assistant Registrar, with a copy of it to the solicitors for JC intimating that they did not agree to the draft judgment and seeking for an appointment under O. 42 r. 8(3) of RHC. According to O. 42 r. 8(2), when a solicitor omits to return the copy of the draft within the time prescribed, he shall be deemed to have consented to the terms thereof. As JD elected not to entertain the notice given by JC under O. 42 r. 8(1) JC was then entitled to invoke O. 42 r. 8(2) of RHC. In my view the terms of the judgment were clearly set out by me and for JD to try and say that the terms of the judgment were disputed by JD, I could only come to one deduction, that is, to delay the execution of the judgment.

As regards the contention of the solicitors for JD that there was no demand made before proceeding with the garnishee proceedings, the short answer is to be found in O. 42 r. 7(1) of RHC which reads:

> A judgment or order of the Court takes effect from the day of its date.

Thus garnishee proceedings, taken between the time of the pronouncement of the judgment and the date it was entered are valid (see page 491

of **Mallal's Supreme Court Practice,** 2nd. Edn.).

In the summons in chambers for a garnishment order *nisi* the summons need to be made only *ex-parte* supported by an affidavit in Form 99 which must satisfy the requirements of paragraphs (a) and (b) of r. 2 of O. 49. Looking at the affidavits filed in support of the summons in chambers I was satisfied that JC has satisfied the requirements of paragraphs (a) and (b).

In the circumstances of this case I was satisfied that the Senior Assistant Registrar has properly exercised her discretion when granting the orders *nisi*. The application to set aside or quash the orders *nisi* was therefore dismissed with costs.

In the application for a stay of all proceedings/ actions to execute the judgment obtained on 30 May 1993 against the defendant until the outcome of the appeal, Kuan Ee Leong, the Chairman of the defendant filed an affidavit in support thereof. From his affidavit, he deposed that the execution of the judgment would jeopardise the projects presently undertaken by the defendant. It was further deposed that in the event that the defendant succeeds on appeal, the plaintiff would not be in a position to pay the defendant as the paid up capital of the plaintiff was small. According to the defendant there are special circumstances to support the application for an order of stay. Quite apart from these grounds, the defendant also contended that there are strong grounds in the appeal to the Supreme Court. This contention is not supported at all in the affidavit. In any event the order of stay is a discretionary power vested in the Court taking into consideration the circumstances of the case. The Counsel for the plaintiffs intimated his agreement for a conditional order to be made and left it to the discretion of the Court. The solicitor for the defendant did not agree as the sum to be deposited would be too high for the defendant to raise. In all the circumstances of the case I was of the view that this would be a proper case for me to make a conditional order. I therefore accordingly made an order of stay on condition that the defendant do deposit in Court a sum of RM900,000 or bank guarantee of equivalent amount on or before two months from date of the order. Costs to be in the cause. I also duly certified that I require no further argument.

PAN GLOBAL INSURANCE SDN. BHD.

v.

ARJUNAN A/L MANICKAM & ANOR.

HIGH COURT, TAIPING
DATO' HAJI ABDUL MALIK BIN HAJI ISHAK JC
[CIVIL APPEAL NO. 12-8-92 (91)]
30 DECEMBER 1993

TORT: Recovery summons against Insurance Company, the appellant for interest due under judgment sum for general and special damages - Claim by respondents were for damages for injuries and loss suffered as a result of an accident - Respondents filed two recovery summons against appellant - First recovery summons did not include interest on the judgment sum - Second recovery summons was for interest on the general and special damages - Whether doctrine of res judicata applies to the second recovery summons - "cause of action estoppel".

In this case, the respondents have filed two recovery summons against the appellant Insurance Company. On 5 January 1990 judgment was given in favour of the respondents in the sum of RM99,213.33 with interest and costs in respect of the claim for injuries and loss suffered by the respondents arising out of an accident on 13 November 1981. The first recovery summons was filed on 25 August 1990 against the appellant for the sum of RM101,812.26 and judgment was given in favour of the respondents. On 22 February 1991, the respondents filed another recovery summons against the appellant wherein the claim was for recovery of interest both special and general damages amounting to RM20,223.50 which they had inadvertently overlooked to claim in the first recovery summons. The Sessions Court, Taiping, gave judgment to the respondents in respect of the second recovery summons. Hence, this appeal against the judgment in respect of the second recovery summons.

Held:

[1] On perusal of the appeal record, the Sessions Judge had considered all the points raised by both parties and had correctly applied the law to the facts in coming to the conclusion that there was no merits in the appellant's arguments.

[2] The appeal was dismissed with costs.

[Appeal dismissed with costs].